SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 966

THE FLORIDA STATE BOARD OF DENTISTRY,
Petitioner,

vs.

DR. ROY F. MACK,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The petitioner, The Florida State Board of Dentistry, seeks review by petition for writ of certiorari of portions of the decision of the Fifth Circuit Court of Appeals, in *Mack* v. *Florida State Board of Dentistry* which has, since the filing of the petition, been reported at 430 F.2d 862. Dr. Mack, as petitioner, has likewise filed a petition for certiorari, in Case No. 963, to review those portions of the Fifth Circuit decision unfavorable to him.

Most of the historical facts surrounding the proceedings are undisputed. In view of the Board's present contentions concerning the lower Courts' alleged lack of jurisdiction, however, the circumstances of the case must be reiterated in somewhat greater detail.

Dr. Mack's license to practice dentistry was ordered revoked by the Florida State Board of Dentistry after a hearing in 1966. Mack then, in the nature of a criminal appeal, petitioned for certiorari to the Florida Third District Court of Appeal to review the order of revocation. The primary basis of the arguments raised in support of the petition concerned the alleged lack of a "fair and impartial trial" and the lack of substantial evidence to support the order. No direct contention concerning the constitutional impropriety of the "mixing of functions" of the Board, or the standard of proof it applied, was presented to the Court of Appeal. In *Mack* v. *Pepper*, Fla.App.1966, 192 So.2d 66, the Third District Court of Appeal denied certiorari, thus affirming the revocation order. Mack then petitioned for certiorari to the Supreme Court of Florida, contending under Florida constitutional provisions that that Court had jurisdiction to review the Court of Appeal decision on the ground that it was in "direct conflict" with prior Florida cases. The Supreme Court of Florida disagreed, and denied the petition solely for lack of jurisdiction—and without passing upon any issue involving the merits—in *Mack* v. *Pepper*, Fla.1967, 201 So.2d 551. Mack did not petition this Court for certiorari of the thus final order of revocation.

Thereafter, however, alleging both Civil Rights Act and federal question jurisdiction—which the District Court and the Fifth Circuit found to have been established—Mack filed the present action in the United States District Court for the Southern District of Florida. The complaint was based upon allegations that Mack had been deprived of fed-

eral constitutional rights to due process in the Board proceedings, resulting in the revocation of his license. It was contended (as it is now contended in Mack's petition for certiorari, Case No. 963) that (a) the Board had not determined his guilt by the constitutionally required standard of "beyond a reasonable doubt"; and (b) the Board's constitutionally improper mixing of investigative, prosecutorial and judicial functions, was likewise violative of the due process provisions of the Fourteenth Amendment. These contentions had never been presented to, nor their merits passed upon, by the Florida state courts.

As the Board's petition correctly points out, the proceedings in the District Court and those in the Fifth Circuit (prior to the rendering of the decision) did *not* concern the contention that the actual hearing, as opposed to the procedures, of the Board had been unfair. This issue *had* been presented to the state courts on review by Mack of the Board's revocation of his professional license.

After the District Court had rejected Mack's first constitutional contention, but accepted the second one concerning the "mixing of functions", the Board appealed and Mack cross-appealed to the Fifth Circuit. During the pendency of the proceedings, the Board filed a motion for summary reversal for lack of jurisdiction of the District Court, claiming that the District Court had no *jurisdiction* to review constitutional questions which Mack had presented. He argued that these questions (a) had not been passed upon by any state court; and (b) had been involved at most only in his required review of the decision in the "quasi-criminal" disciplinary proceeding against him. In an order, dated March 31, 1970, the Board's motion to reverse was denied by the Fifth Circuit.

The Fifth Circuit decision, as is noted in the petition in Case No. 963, (a) affirmed the District Court rejection

of the argument that the "beyond a reasonable doubt" test was unconstitutionally required; and (b) vacated, as "unnecessary" to its decision the District Court determination on the mixing of functions issue. Upon its own independent examination of the record of the dental board hearing, however, it concluded that there was no "hearing" in any constitutional sense at all; rather, it characterized the Board hearing as an "ungoverned confrontation" which could not have operated constitutionally to deprive Mack of his license to practice dentistry. While Mack timely petitioned for rehearing and rehearing en banc of this decision, the Board's petition for rehearing was untimely filed and seems not to have been considered by the Fifth Circuit.

ARGUMENT

The respondent, Dr. Mack, contends that the Board's petition should not be granted since the Fifth Circuit determinations which were *un*favorable to it, are in entire accord with prior decisions of this Court and of other Circuits, entirely correct, and do not justify certiorari review.

The Board apparently bases its contentions in support of the granting of the petition upon two claims:

(a) The Fifth Circuit improperly reviewed an issue —whether there had been a "fair and impartial" hearing —which had been presented to the Florida state courts and resolved in favor of the Board; and

(b) That the federal courts lacked jurisdiction over the entire proceeding because it constituted an attempt to secure "appellate review" of the Florida decisions. Neither provision is correct.

The Board's position is essentially based upon the existence of alleged conflicts with the determination of this Court in *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923) as applied in such decisions as *Brown* v. *Chastain*, 5 Cir.1969, 416 F.2d 1012; *Paul* v. *Dade County*, 5 Cir.1969, 419 F.2d 10; and *Deane Hill Country Club, Inc.* v. *City of Knoxville*, 6 Cir.1967, 379 F.2d 321, which holds that parties could not relitigate in the federal District Court identical federal constitutional questions which had already been litigated and decided in state courts, so that the sole effect of a District Court determination in the plaintiff's favor would be directly to overrule state court decisions. But the *Rooker* rule is applicable, by its terms, only to *civil* litigation in which a party has voluntarily submitted a given federal question to a state court and been unsuccessful.

1. In this instance, however, the *Rooker* rule cannot be, and is not applicable even to the Fifth Circuit rejection of the issue which *had* been submitted to the Florida Third District Court of Appeal on the merits—the fairness and impartiality of the hearing itself. This is so because the only state court proceedings were upon Dr. Mack's attempted review of the decision of the Board—acting as a prosecutorial agency—revoking his license to practice dentistry. This Court in *Re Ruffalo*, 390 U.S. 544 (1968) has characterized such a proceeding as "quasi-criminal" in nature. There is no question but that Dr. Mack was entitled, under the United States Constitution, to due process of law in the Board proceeding—at the least to a "hearing" which was in fact a "hearing". His petitions for certiorari must therefore be analogized to mere appeals from a state criminal conviction.

Although the action below was not a petition for writ of habeas corpus, the interests involved were just as sig-

nificant as the right to physical liberty secured by the writ, see *Sperack* v. *Klein*, 385 U.S. 511 (1967). The rule of *Fay* v. *Noia*, 372 U.S. 391 (1963) which of course requires independent federal review of asserted deprivals of federal constitutional rights in criminal proceedings, is applicable to proceedings such as this one. The *Rooker*, *Brown* and *Paul* cases, which involved mere civil litigation, are not. The rule of the *Rooker* case in other words does not, under any circumstances, preclude the right of one deprived of the right to practice his profession by a quasi-criminal proceeding, properly to invoke the jurisdiction of a federal court to determine federal due process questions. As the Fifth Circuit itself stated in *Hanna* v *Home Ins. Co.*, 5 Cir.1960, 281 F.2d 298, 303:

> "*Unless alleged errors constitute a deprivation of constitutional rights*, they may be reviewed only by the United States Supreme Court. Rooker v. Fidelity Trust Co., 1923, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362." [Emphasis supplied]

Nor does the fact that the Fifth Circuit ruled upon the "fairness" issue *sua sponte* present any basis for review by this Court. The action of the Fifth Circuit represented no more than an application of the familiar and widely applied "plain error" rule recognized, for example, in the rules of this Court itself, Rule 40(1)(d)(2).

2. Insofar as the present petition claims a total lack of jurisdiction in the District Court to review even the claims raised by the plaintiff in the complaint in the District Court and before this Court in Case No. 963, it presents no reviewable question for still another reason. The *Rooker*, *Brown* and *Paul* cases are based upon the determination, as stated in *Rooker* at 263 U.S. 414, that federal courts could not reverse state courts on "constitutional questions . . . [which] actually arose in the cause. . . ."

Neither of the constitutional questions raised by the plaintiff in fact arose or were decided in the state court proceedings. There is nothing in any applicable decision to preclude initial determination by federal courts of federal due process contentions.

The authorities cited by the Board, which deal with the lack of federal "power" to review state decisions, of course have no relevance to cases in which, like this one, federal jurisdiction is properly invoked to determine federal constitutional questions. Compare Wood v. Covenant *Lake Park, Inc.*, W.D.Pa.1968, 288 F.Supp. 777, aff'd 3 Cir.1968, 396 F.2d 121, cert.den. 391 U.S. 907; cf. *Hanna* v. *Home Ins. Co.*, supra.

REASON FOR DENYING PETITION

The petition for certiorari should not be granted because the decision of the Court of Appeals for the Fifth Circuit, insofar as it is unfavorable to the petitioner here, is in conflict with no other decision of this Court or of another court of appeals on the same matter, and has decided the issues raised entirely in accordance with applicable decisions of this Court.

Respectfully submitted,

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By .....
ROBERT J. BECKHAM

I HEREBY CERTIFY that 3 copies of the foregoing rief of Respondent in Opposition to Petition for Writ of ertiorari have been mailed to ROBINSON & RANDLE, SQS., First Bank & Trust Building, Jacksonville, Florida 202, this 11th day of December, 1970.

ROBERT J. BECKHAM